Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 87-782

In The

United States Supreme Court

October Term, 1987

JAMES R. WESNER

vs.

Appellant

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION NO. 764, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, CHARLES E. GREENAWALT, ROBERT L. JOHNSON, ROBERT B. FISHER, JR., PAUL K. REGOPOULOS, JR., KENNETH E. REIGEL, and SAMUEL MONTGOMERY,

Appellees

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Table of Authorities i
Opinions Delivered in the Courts Below 1
Statement of the Case 1
Reasons for Disallowance of the Writ 2
Memorandum Opinion in Connection with
Judgment Appealed From ..... App. 1
Certificate of Service

TABLE OF AUTHORITIES

Page

STATUTE:
Labor Management Reporting and Disclosure Act,
29 U.S.C. Sec. 411(a)(2), 412 and 529 ..... 2, 3, 4

CASES:

Adams-Lundy v. Flight Attendants,
731 F.2d 1154 (5th Cir. 1984) 3
Bradford v. Textile Workers of America, AFL-CIO,
563 F.2d 1138 (4th Cir. 1977) 3
Finnegan v. Leu
456 U.S. 431 (1982) 3, 4
Grand Lodge v. King
335 F.2d 340 (9th Cir. 1964) 3
Lamb v. Miller,
660 F.2d 792 (D.C. Cir. 1981) 3
Schonfeld v. Penza,
477 F.2d 899 (2nd Cir. 1973) 2
Wood v. Dennis,
489 F.2d 849 (7th Cir. 1973) 3

OPINIONS DELIVERED IN THE COURTS BELOW

Contrary to the representations of the Appellant in its Petition for Writ of Certiorari, the United States Court of Appeals for the Third Circuit did, in fact, file a Memorandum Opinion in this matter. A true and correct copy of that Opinion is attached to this brief as Appendix 1.

STATEMENT OF THE CASE

The Appellees contest the sentence in the Appellant's rendition of the facts that states as follows: "Appellant was selected for layoff because the individual Defendants herein believed him to be in opposition to them as officers of Defendant Local Union". Such statement is a legal conclusion, not a fact considered by the courts below in assessing the validity of summary judgment. The relevant fact conceded by the Appellant is that the Defendant Local Union was experiencing financial difficulties at that time. The legal argument made by the Appellees was that such financial difficulties necessitated a reduction in the number of business agents and resulted in the Appellant's layoff. The legal argument made by the Appellant was that he was chosen to be laid off because of his political opposition to the individual Appellees.

In its Memorandum Opinion in this matter, the Third Circuit stated that "it is undisputed that subsequent to his removal . . ., Mr. Wesner remained active in the political affairs of the local, regularly attending meetings and running for elected office." The Third Circuit also noted that the Appellant here "concedes that

he has actively participated in union politics since his layoff, including running for executive office."

REASONS FOR DISALLOWANCE OF THE WRIT

The Appellant's Petition for Writ of Certiorari misstates the holding of the Third Circuit in this matter and mischaracterizes the current state of law in the Circuits with respect to the applicability of the Labor Management Reporting and Disclosure Act, 29 U.S.C. Sec 411(a)(2), 412 and 529, (hereinafter the "LMRDA") to elected union officers.

The Third Circuit in this matter did not state that the termination of an elected union officer in reprisal for his internal union political activities does not violate the LMRDA. Rather the precise holding of the Third Circuit was that the Appellant failed to make out a triable cause of action on the issue of whether his layoff "was part of a purposeful and deliberate attempt to suppress dissent within the Union." The quoted language of the Third Circuit in its decision in this case was a paraphrase of language in the decision of *Schonfeld v. Penza,* 477 F.2d 899 (2nd Cir. 1973). In that decision, the Second Circuit held that, although the LMRDA imparts no rights to a deposed union officer by virtue of his status as a union *officer*, the deposed officer can make out an LMRDA cause of action as a union *member* by showing a deliberate attempt by union officials to suppress dissent within the union.

Despite the clear holding of *Schonfeld v. Penza, supra,* the Appellant inexplicably lists the Second Circuit as being in conflict with the Third Circuit with respect to the

applicability of the LMRDA when an officer loses his job. Similarly, the Appellant mischaracterizes the law of the Fifth Circuit and the Seventh Circuit. See *Adams-Lundy v. Flight Attendants,* 731 F.2d 1154 (5th Cir. 1984) and *Wood v. Dennis,* 489 F.2d 849 (7th Cir. 1973). Moreover, the decision of the Ninth Circuit in *Grand Lodge v. King,* 335 F.2d 340 (9th Cir. 1964), involving an appointed union officer, can hardly be considered a viable precedent after this Court's decision in *Finnegan v. Leu,* 456 U.S. 431 (1982). In *Lamb v. Miller,* 660 F.2d 792 (D.C. Cir. 1981), the precise holding of the court was that summary judgment is improper in an LMRDA action where an union officer who had been dismissed presents sufficient evidence alleging that the dismissal was due to political motivations. The Court acknowledged, however, that the LMRDA violation occurs because of interference with the unions officer's democratic rights as a member of the union rank-and-file. Finally, in *Bradford v. Textile Workers of America, AFL-CIO,* 563 F.2d 1138 (4th Cir. 1977), the Fourth Circuit held that an elected union officer could use the LMRDA to seek redress for a dismissal when the evidence proved that the dismissal was in retaliation for an exercise of his free speech rights. But, again, the court stated that " . . . a union member, by accepting an elected office in the union, does not forfeit his rights expressly given him *as a union member* under the Act and is entitled to be protected from 'discipline' . . . in connection with his union office." 563 F.2d at 1142 (emphasis added).

As demonstrated above, it is arguable whether there ever existed in the Circuits a conflict over the precise question of whether a union officer is entitled to special LMRDA protections above and beyond the protections

afforded him by virtue of his status as a union member. To the extent that there was a conflict on this point, however, it was resolved by this Court in *Finnegan v. Leu*, 546 U.S. 431 (1982), wherein it was stated that "it was rank-and-file union members - not union officers or employees as such - whom Congress sought to protect [by enacting the LMRDA]." 456 U.S. at 437 (footnote deleted).

For all of the foregoing reasons, the Appellees respectfully submit that this Court should disallow the writ. It is settled law in every Circuit that a union officer who is discharged by the union can make out a cause of action under the LMRDA only by setting forth sufficient evidence showing that the union infringed the rights guaranteed to him as a union member by the LMRDA. To have withstood the summary judgment motion in this case, the Appellant had to present sufficient evidence that his layoff was part of a purposeful and deliberate attempt to suppress dissent within the union. He did not do so. On the contrary, the Appellant conceded as a fact that, after his layoff, he remained active in intra-union political affairs and even ran for office. The thrust of his case is that, simply because he was laid off as an officer and simply because he was a political opponent of the individual Appellees, he makes out a triable LMRDA cause of action. That approach is contrary to the settled law of this Court. Accordingly, the writ should be disallowed.

Respectfully Submitted
ON BEHALF OF APPELLEES:

By: Ira H. Weinstock Gerard M. Mackarevich

IRA H. WEINSTOCK
Counsel of Record

GERARD M. MACKAREVICH

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5016

WESNER, James R., *Appellant*

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION NO. 764 A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, GREENWALT, Charles E., JOHNSON, Robert L., FISHER, Robert B., Jr., REGOPOULOS, Paul K., Jr., REIGEL, Kenneth E., and MONTGOMERY, Samuel

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Appeal from the United States District Court
for the Middle District of Pennsylvania - Scranton
(D.C. Civil No. 86-0021)
District Judge: Honorable William V. Caldwell

Submitted Pursuant to Third Circuit Rule 12(6)
June 19, 1987
Before: SEITZ, MANSMANN, *Circuit Judges,*
and BISSELL, *District Judge**
(Filed June 25, 1987)

MEMORANDUM OPINION OF THE COURT

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*Honorable John W. Bissell of the United States District Court for the District of New Jersey, sitting by designation.

APPENDIX 1

MANSMANN, *Circuit Judge.*

This is an appeal from the district court's grant of summary judgment for the defendant International Brotherhood of Teamsters on the ground that the plaintiff had failed to state a cause of action under the Labor Management Reporting and Disclosure Act ("LMRDA"), 27 U.S.C. §401 *et seq.* For the reasons stated below we will affirm the judgment of the district court.

I

The plaintiff, James Wesner, is a member of the International Brotherhood of Teamsters. He was first appointed to the position of business agent in 1974, and was subsequently elected to that position in 1976, 1979 and 1982, by members of Local No. 764. In 1982 he was one of four agents employed by the local. On September 1, 1984, the plaintiff's position was eliminated pursuant to a vote of the local's Executive Board, which maintains that the action was taken due to economic conditions necessitating a reduction in the number of business agents.

The plaintiff contends that he was chosen for termination because of his political opposition to the local's leadership. He concedes that the local was experiencing financial difficulties at that time.

After his termination Mr. Wesner sought relief through the internal channels of the union, but was unsuccessful in two appeals. After exhausting his internal remedies, he sought relief in the federal courts. Summary judgment was granted for the defendant, and the plaintiff has appealed.

Our standard of review of a motion for summary judgment is well established. Summary judgment shall be granted if there is no genuine issue as to any

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material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). We are required to apply the same test the district court should have utilized initially. Inferences to be drawn from the underlying facts contained in the evidential sources must be viewed in the light most favorable to the party opposing the motion. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566 (3d Cir. 1976) *cert. denied.* 429 U.S. 1038 (1977).

II

It has long been established in this circuit that neither Title I nor §609 (29 U.S.C. §529) of the LMRDA affords an elected union official as a remedy for his removal from office prior to the expiration of his term. *See Martine v. Laborer's Local Union* 1058, 410 F.2d 32 (3d Cir. 1969); *Sheridan v. United Brotherhood of Carpenters*, 306 F.2d 152 (3d Cir. 1962). The rationale for this rule is that the Labor Management Reporting and Disclosure Act is intended to protect the union-member relationship, and not the union-officer, or union-employee relationship. *Martine,* F.2d at 35. Moreover, the Supreme Court held recently, "[i]t is readily apparent, both from the language of these provisions [29 U.S.C. §411(a)(1) and (2), 529] and from the legislative history of Title I, that it was rank-and-file union members - not union officer or employees, as such — whom Congress sought to protect." *Finnegan v. Leu*, 456 U.S. 431, 436-437 (1982). Although *Finnegan* dealt directly with *appointed* union officers, the court made it clear that discharge from union employment which does not impinge upon the incidents of union membership as such was not protected. In *Martine*, we further noted that if a penalty were imposed upon a union officer which affected his status *qua* union member, then the LMRDA would afford the member a remedy.

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In this case, it is undisputed that the plaintiff was an elected official, having attained the status of business agent. Further, it is undisputed that but for the action of the Local's Executive Board, on September 1, 1984, the plaintiff would have retained his position as business agent until January 12, 1986. Finally it is undisputed that subsequent to his removal from the position of business manager, Mr. Wesner remained active in the political affairs of the local, regularly attending meetings and running for elected office.

Under this set of facts, we cannot find that the union-member relationship protected by the LMRDA was violated. No denial of Mr. Wesner's rights or abridgement of his status as a union member occurred. *See Martine*, 410 F.2d 32. Therefore, Mr. Wesner's layoff did not violate the LMRDA.

Mr. Wesner maintains nonetheless that it is his removal for voicing opposition to other office holders which differentiates his case, and provides him a remedy under the LMRDA. However, in order to maintain a free speech claim, the plaintiff must allege that his dismissal was part of a purposeful and deliberate attempt to suppress dissent within the union. *Adam S. Lundy v. Association of Professional Flight Attendants*, 731 F.2d 1154 (5th Cir. 1984); *Schonfeld v. Penza*, 477 F.2d 899 (2d Cir. 1973); *Collins v. Pennsylvania Telephone Union, Local No. 1944*, 431 F. Supp. 842 (W.D. Pa. 1977).

We find no such allegations arising from the circumstances presented from this case. Indeed, plaintiff concedes that he has actively participated in union politics since his layoff, including running for executive office. Therefore, we cannot say that the plaintiff has made out a cause of action under the LMRDA.

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Accordingly, we will affirm the judgment of the district court.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

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CERTIFICATE OF SERVICE

AND NOW, this 10th day of December, 1987, I, Ira H. Weinstock, Counsel of Record for Appellees, hereby certify that I served three (3) copies of the foregoing **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** by depositing the same in the United States mail, postage prepaid, in the post office at Harrisburg, Pennsylvania, addressed to, by first class mail:

Allen K. Neyhard, Esquire
3 West First Street
P.O. Box 265
Watsontown, Pennsylvania 17777

By: Ira H. Weinstock
IRA H. WEINSTOCK

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